

IN RE DISQUALIFICATION OF FROST.

WILCOX v. WILCOX.

[Cite as *In re Disqualification of Frost*, ___ Ohio St.3d ___, 2020-Ohio-4932.]

Judges—Affidavits of disqualification—R.C. 2701.03—Affiant failed to demonstrate bias, prejudice, or appearance of impropriety and failed to establish that information from judge’s potential testimony is material to disposition of pending motion and unavailable from other sources—Disqualification denied.

(No. 20-AP-072—Decided September 23, 2020.)

ON AFFIDAVIT OF DISQUALIFICATION in Licking County Court of Common Pleas,
Domestic Relations Division, Case No. 2015 DR 00574.

O’CONNOR, C.J.

{¶ 1} Defendant Grant T. Wilcox has filed an affidavit pursuant to R.C. 2701.03 seeking to disqualify Judge Duke Frost from the above-referenced divorce case. This is the second affidavit of disqualification that Mr. Wilcox has filed against Judge Frost in this matter. His first affidavit was denied in an entry dated June 14, 2018. *See* Supreme Court case No. 18-AP-063.

{¶ 2} Mr. Wilcox claims that Judge Frost should be removed for two reasons. First, he asserts that the judge attempted to interfere in Mr. Wilcox’s bankruptcy proceeding by issuing a warrant for his arrest in violation of an automatic stay. Second, he claims that the judge or his magistrate will be a witness regarding Mr. Wilcox’s pending motion for contempt against his ex-wife.

{¶ 3} Judge Frost filed a response to the affidavit and does not believe that he has taken any action in the underlying case that would create an appearance of bias.

{¶ 4} In disqualification requests, “[t]he term ‘bias or prejudice’ ‘implies a hostile feeling or spirit of ill-will or undue friendship or favoritism toward one of the litigants or his attorney, with the formation of a fixed anticipatory judgment on the part of the judge, as contradistinguished from an open state of mind which will be governed by the law and the facts.’ ” *In re Disqualification of O’Neill*, 100 Ohio St.3d 1232, 2002-Ohio-7479, 798 N.E.2d 17, ¶ 14, quoting *State ex rel. Pratt v. Weygandt*, 164 Ohio St. 463, 469, 132 N.E.2d 191 (1956). “The proper test for determining whether a judge’s participation in a case presents an appearance of impropriety is * * * an objective one. A judge should step aside or be removed if a reasonable and objective observer would harbor serious doubts about the judge’s impartiality.” *In re Disqualification of Lewis*, 117 Ohio St.3d 1227, 2004-Ohio-7359, 884 N.E.2d 1082, ¶ 8.

{¶ 5} Mr. Wilcox has not established that Judge Frost has hostile feelings toward him or has formed a fixed anticipatory judgment on any issue in the case. Nor has Mr. Wilcox set forth a compelling argument for disqualifying Judge Frost to avoid an appearance of partiality. According to the judge, he had a good-faith belief that the bankruptcy stay would not prevent enforcement of his orders in the underlying divorce case. But when the bankruptcy court stayed all aspects of the divorce case, the judge notes, he took prompt action to comply. Based on this record, Mr. Wilcox has not established that the judge’s actions were the product of any bias or that an objective observer would reasonably question the judge’s partiality.

{¶ 6} Judge Frost did not directly address Mr. Wilcox’s allegation that the judge or his magistrate will be a witness. Nevertheless, the chief justice has previously “ ‘declined to establish a rule “requiring disqualification of a judge based solely on suppositions that the judge may be called as a witness or allegations that the judge possesses evidence material to the case.’ ” *In re Disqualification of Hedric*, 127 Ohio St.3d 1227, 2009-Ohio-7208, 937 N.E.2d 1016, ¶ 9, quoting *In*

re Disqualification of Stuard, 113 Ohio St.3d 1236, 2006-Ohio-7233, 863 N.E.2d 636, ¶ 6, quoting *In re Disqualification of Gorman*, 74 Ohio St.3d 1251, 657 N.E.2d 1354 (1993).

“The mere suggestion that [a judge] may be a witness in [the] case and an allegation that her testimony may be material to disposition of the case are insufficient to establish the existence of bias, prejudice, or other disqualifying interest.” *Gorman* at 1251, 657 N.E.2d 1354. Moreover, when the evidence may be obtained from witnesses other than the trial judge, the judge is not such a material witness as to require the judge’s disqualification. *Hedric* at ¶ 9, citing *Stuard* at ¶ 6. Indeed, mere familiarity with the circumstances surrounding the trial does not render the judge a material witness. *Stuard* at ¶ 6 * * *.

(Brackets sic.) *In re Disqualification of Matia*, 135 Ohio St.3d 1246, 2012-Ohio-6343, 986 N.E.2d 8, ¶ 9.

{¶ 7} Here, Mr. Wilcox alleges that Judge Frost will be a witness at a hearing on Mr. Wilcox’s pending contempt motion against his ex-wife. But he has not established that the information from the judge’s potential testimony is material to disposition of the motion and unavailable from other sources.

{¶ 8} To be sure, if Judge Frost ultimately concludes that he or his magistrate is likely to be a material witness, he must disqualify himself, as Jud.Cond.R. 2.11(A)(2)(d) directs. “Every litigant is entitled to have his or her case decided by a judge who can approach the case in an objective and impartial manner, and a judge who possesses personal knowledge of evidentiary facts that are in dispute may not be able to meet this criterion.” *Matia* at ¶ 11; *see also In re Disqualification of Crawford*, 81 Ohio St.3d 1204, 688 N.E.2d 510 (1996)

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(disqualifying all judges of a common pleas court from a case that would require the court to assess the professional abilities and credibility of a judicial officer of that court); *In re Disqualification of Rastatter*, 113 Ohio St.3d 1218, 2006-Ohio-7226, 863 N.E.2d 623, ¶ 6 (“The roles of judge and witness are incompatible”).

{¶ 9} “The statutory right to seek disqualification is an extraordinary remedy. A judge is presumed to follow the law and not to be biased, and the appearance of bias or prejudice must be compelling to overcome these presumptions.” (Citation omitted.) *In re Disqualification of George*, 100 Ohio St.3d 1241, 2003-Ohio-5489, 798 N.E.2d 23, ¶ 5. Mr. Wilcox has not overcome those presumptions here.

{¶ 10} The affidavit of disqualification is denied.
